IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

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JUDGMENT

Madan Singh.
vs.
LRs. Of Mohan Das.

S.B.CIVIL SECOND APPEAL NO.260/2005 UNDER SECTION 100 CPC AGAINST THE JUDGMENT AND DECREE DATED 6.4.2005 PASSED BY SHRI S.K. PAREEK, DISTRICT JUDGE, PALI IN CIVIL APPEAL DECREE NO.67/2003.

DATE OF JUDGMENT ::: 13.3.2007

PRESENT

HON'BLE MR. PRAKASH TATIA, J.

Mr. RR Nagori, for the appellant.
Mr. SN Vyas, for the respondent.

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BY THE COURT:

Heard learned counsel for the parties.

The appellant/defendant is aggrieved against the judgment and decree dated 5.9.2003 by which the trial court decreed the suit of the plaintiff against the

respondent/tenant for eviction and also aggrieved against the judgment and decree dated 6.4.2005 by which the first appellate court dismissed the appeal of the appellant/tenant.

It will be appropriate to narrate the facts of the case because of the reason that it is third round of litigation between the landlord and tenant.

First suit no.59/1975 was filed by landlord Mohan Das against his original tenant Kalu Singh wherein ultimately, the matter was settled between the parties and the rent of suit shop was increased from Rs.18/- to Rs.40/- per month.

Second suit no.252/1991 was filed by landlord for eviction of tenant only on the ground of non-payment of rent.

At this juncture, it will be worthwhile to mention here that even during pendency of first suit no.59/1975, original tenant Kalu Singh died and his son Madan Singh, present appellant, was impleaded as party who entered into compromise and agreed to increase the rent from Rs.18/- to Rs.40/- per month.

In the second suit also, the present appellant alone was party. During pendency of second suit no.252/1991, landlord deceased Mohan Das filed the third suit no.42/1999 against the present appellant on the grounds of material alteration in part of the

leased property and on the ground of change of user as well as for parting with possession of the suit premises i.e. parties with one chabootari by present tenant Madan Singh.

It is stated that second suit no.252/1991 since was only on the ground of default and it was not contested, therefore, in second suit, the Court gave benefit of first default to the tenant and thereafter dismissed the suit so far as relief of eviction is concerned.

As stated above, before decision of second suit no.252/1991, the plaintiff filed the present suit no.42/1999 for eviction on the grounds mentioned above.

The defendant's plea was that the suit was barred by the provisions of Order 2 Rule 2 CPC because of the reason that the alleged all events took place before filing of the second suit no.252/1991 and the plaintiff therein did not choose to take the grounds against the defendant for eviction on the grounds which are now taken in the subsequently filed suit. It is also submitted that in view of suit no.252/1991 decided on 5.9.1994, the present suit is barred by principles of res-judicata. It was also submitted that the suit is not maintainable for want of necessary party.

On merits, it was contended that the defendant did not change the user of the premises nor has made any alteration. It is also submitted that the allegation

against the tenant is that he removed Kelu roof and replaced it by cement sheets. It is also submitted that this does not amount to material alteration in the suit property.

Learned counsel for the appellant vehemently submitted that mere change of small portion of rented premises is not change of user of premises as a ground of eviction under the provisions of Rent Control Act and according to learned counsel for the appellant, this view find supports from the judgment of the Hon'ble Apex Court delivered in the case of Prem Chand vs. The District Judge, Dehradun and another reported in AIR 1977 SC 364 and from the judgment of Punjab and Haryana Court delivered in the case of Hira Lal vs. Hav. Kirpa Ram reported in 1977(2) RCR 352.

Learned counsel for the appellant also submitted that in the original lease contract reduced in writing by executing rent deed dated 3.1.1967, both the parties i.e. lessor and lessee agreed that on the chabootari, tenant shall have right to construct shop with a restriction that he will not do the business of liquor in that shop. It is further submitted that the said tenancy was not surrendered by Kalu Singh or his legal representatives including the appellant and, therefore, by that deed, the tenant has been given permission to

raise construction of shop on the chabootari. The rent deed dated 1.8.1980 was got executed by the landlord from the defendant by deceitful means and even if the said deed is considered, then also it is clear that the permission of the landlord to the tenant permitting him to raise construction of shop has not been withdrawn nor it has been provided that that chabootari shall not be used for commercial purpose. Learned counsel for the appellant relied upon the judgment of the Hon'ble Apex Court delivered in T.K. Lathika vs. Seth Karsandas Jamnadas reported in (1999) 6 SCC 632, wherein it has been held that mere addition, alteration in some of the terms and conditions of the concluded contract of tenancy cannot amount to creation of new tenancy or surrender of original tenancy. In view of the above, the defendant has not incurred any disqualification for continuing his tenancy.

I considered the submissions of learned counsel for the appellant and perused the reasons given by the two courts below as well as the record.

It is not in dispute that originally rent deed dated 3.1.1967 was executed for the same premises between landlord Mohan Das and tenant Kalu Singh. That rent deed was not produced by the defendant in the trial court. The defendant submitted application under

Order 13 Rule 2 CPC for producing said rent deed. The trial court rejected the said application on the ground of inordinate delay. However, the first appellate court further gave reason for not taking on record the lease deed of the year 1963 and that was because of the execution of fresh lease deed dated 6.8.1980, the original lease deed dated 3.1.1967 lost its significance and, therefore, the first appellate court held it to be irrelevant.

Two courts below rejected the defendant's plea that the suit was not maintainable because of non-joinder of necessary parties or it is barred by principles of res-judicata.

It is not in dispute that as back as during pendency of the first suit, original tenant Kalu Singh expired and the present appellant alone became party in the suit and entered into compromise and increased the rent and, therefore, the courts below rightly held that the suit is not suffering from any error of non-joinder of the parties. It will be further worthwhile to mention that even in second suit filed for default in payment of rent, the appellant was only the party. Apart from the above, the rent deed dated 6.8.1980 was executed by appellant Madan Singh alone and he agreed for certain terms and conditions how the premises will be used. Therefore, the appellant now cannot turn round and say that the legal heirs of Kalu Singh were

necessary parties or they were tenants in the suit premises.

The contention of the landlord was that there was material alteration in the suit premises by removing Kelu roof and putting cement sheets and conversion of chabootari into shop, may it be by putting any temporary roof. So far as the contention of the appellant regarding original lease deed dated 3.1.1967 permitting the tenant to raise construction of shop as well as permitting the tenant to do business over the said chabootari is concerned, it is relevant to mention here that that condition, which was incorporated in the lease deed, was not given effect for 13 years by the tenant i.e. upto 6.8.1980 and obviously, that was the reason for making provision about the use of chabootari by the tenant otherwise, there would not have been any occasion for mentioning said portion of the premises as chabootari only with the restriction that after 6.8.1980, the tenant would not be entitled to put even a cabin over the chabootari to run any business. That condition bound down the present tenant and restricted him from doing any business over the chabootari and the tenant voluntarily relinquished his right which he is claiming under the deed dated 3.1.1967.

The argument advanced by learned counsel for the

appellant based on the judgment of the Hon'ble Apex Court in the case of T.K. Lathika (supra) is concerned, then also, the original tenancy of 1967 does not stand surrendered by agreeing for certain changes in the terms and conditions of the lease, then the lease deed dated 6.8.1980 can be said to be a lease supplementary to the original lease and is not destructive to the original lease deed dated 3.1.1967, then also, the condition for which the tenant/appellant consciously agreed, even when more benefits were available in the lease deed dated 3.1.1967, the tenant cannot disown and turn around by saying that he is not bound by what has been stated in the deed dated 6.8.1980. The parties to contract by mutual consent give benefit to each other or may relinquish their rights that too without affecting the nature and character of the parties in the transaction. Therefore, on 6.8.1980, the present appellant himself agreed that he will not put any cabin over the chabootari and he also did not choose to get incorporated the conditions of the rent dated 3.1.1967 like permission of landlord to construct the shop or/and permitting the tenant to do business on the said portion of the lease property. Therefore, the appellant is bound by the conditions mentioned in deed dated 6.8.1980.

At the time, when the deed dated 6.8.1980 was executed, admittedly, the chabootari was in the shape

of chabootari only and the tenant was even denied the permission to put any cabin, then certainly that makes the intention of the parties clear that the said chabootari shall be used as chabootari only and the tenant was not even permitted to put even a temporary structure for carrying on the business. Some inferences are required to be drawn from the admitted and proved facts and in view of the above, the defendant/tenant certainly put the chabootari to different use than the one for which it was taken.

So far as conversion of said chabootari into commercial premises or commercial space is concerned, the plaintiff though has not mentioned that the defendant did so but the defendant when admitted that he has put a temporary roof over the premises and therein, there is a business, then that was a case of admitted fact of conversion of premises and hence, the onus was upon the defendant to plead and prove under what right and when he converted the premises into commercial premises. Two courts below recorded finding of fact against the defendant, therefore, this Court is not inclined to appreciate and re-appreciate the evidence in the facts of the case on this issue.

So far as the legal proposition as laid down by the Hon'ble Apex Court in the case of Prem Chand (supra) reported in AIR 1977 SC 364 and the reasons

given by Punjab and Haryana Court in the case of Hira Lal (supra) are concerned, it will be worthwhile to mention here that in the case before Hon'ble Apex Court, in two room rented premises where the family was residing, the tenant started tailoring business in one of those two rooms, therefore, on facts, the Hon'ble Apex Court held that that does not amount to change of user because of doing the business of tailoring in such premises. Contrary to it, the chabootari was also rented premises and for which there was specific agreement of allowing tenant originally to do business and subsequently, it was agreed that even no cabin can be put on the said chabootari and that was specific separated portion and that too abutting the house itself and affecting the frontage. In these circumstances, the judgment of Hon'ble Apex Court in the case of Prem Chand (supra) has no applicable to the facts of this case.

In view of the above, I do not find any substantial question of law involved in this appeal and this second appeal deserves to be dismissed.

At this stage, learned counsel for the appellant prayed that some time may be granted to the appellant to vacate the suit premises.

I considered this prayer of learned counsel for the appellant and looking to the facts of the case, this Court is of the view that the appellant be granted time upto 31.3.2008 to vacate the suit premises.

Therefore, it is ordered that in case, the appellant furnishes a written undertaking before the trial court within a period of two months from today that he shall hand over the vacant possession to the landlord by or before 31.3.2008 and shall not part with the possession or sublet the suit premises during this period and shall pay all the arrears of rent and decreetal amount, if due, within a period of two months from today before the trial court or directly to the landlord, the decree under challenge shall not be executed till 1.4.2008. The appellant shall also deposit the rent month by month by 15th day of each succeeding month of his tenancy in the trial court or pay directly to the landlord.

In case of non-compliance of the order or default in payment of rent mentioned above, the decree shall become executable forthwith.

With the aforesaid concession, this appeal is dismissed.

(PRAKASH TATIA), J.

S.Phophaliya